



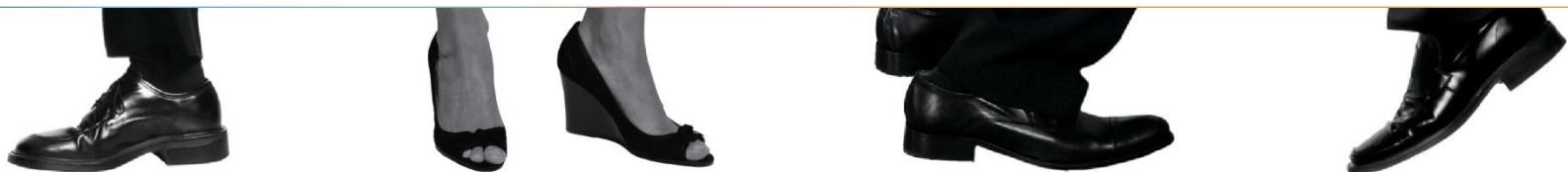
# The Employment Law

# QUIZ SHOW

Mark Toth  
Chief Legal Officer NA  
July 28, 2010



Manpower®



# Today's Format

- Shout-outs
- What Are You Thinking?
- Text-o-rama
- Lightning Round
- Latest News
- Tools & Tips
- “Smartest Person in the Audience” Quiz
- Valuable Prizes



## Official Disclaimer

The material presented herein should not be relied upon or construed as legal advice. For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.

**Please consult with your own Legal and HR Departments before making any changes.**

Why You Should

**STAY**

**AWAKE**

During This Webinar

# According to a recent study, what is the #1 legal headache for U.S. businesses?

- A. Environmental regulation
- B. Patent protection
- C. International contract laws
- D. Employment law disputes
- E. Lawyers



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*Source: Fulbright & Jaworski*

# On average, how many employment lawsuits are filed every day?

- A. 55
- B. 197
- C. 362
- D. 500
- E. Too high to count



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*Source: Council on Education in Management*



# What % of employment lawsuits are won by the employer?



- A. It is unlawful for employers to win
- B. 18%
- C. 38%
- D. 52%
- E. 67%

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**1 out of \_\_\_ employment law jury verdicts is a million-dollar case.**

- A. 1 million
- B. 1,000
- C. 100
- D. 10
- E. 5



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*Source: Critical Measures*



# Employers in Court

- **Class Actions**
  - Wage & hour
  - Executive misconduct
  - “Systemic” discrimination
  - OSHA violations
- **Hot Spots:** CA, FL, IL, MS, NJ, NY, PA and TX
- **Retaliation**



*Sources: Seyfarth Shaw; Washington Post; Business Week*

# Employers in Court

- **More Litigation**
  - Up for 3<sup>rd</sup> straight year
  - MP Q2 Index: 31% increase vs. 3% decrease
- **Litigation Costs Up:** Companies spending \$1+ million increased by 18%
- **Median Verdict:** \$326,640 (up 60%)



Sources: *Jury Verdict Research, Fulbright & Jaworski, Seyfarth Shaw*

## **QUARTERLY LITIGATION INDEX:** **Are you seeing an increase in employment law claims?**

- A. Yes, substantial increase
- B. Yes, modest increase
- C. No change
- D. No, modest decrease
- E. No, substantial decrease

Big Hairy

SUITS

## Which of the following happened recently?

- A. Record EEOC \$\$\$ recoveries
- B. Record # of retaliation, religion, disability & national origin claims
- C. Largest gender discrimination verdict ever
- D. Largest class action employment lawsuit ever
- E. All of the above (and much much more)

# How to Lose \$152 Million

## TIMELINE

- 10 years on *Working Mothers* best employers list
- 2003: 1<sup>st</sup> charge – pattern and practice of discrimination
- 2004: Lawsuit filed
- 2007: Class certified – all female salespersons since 2002
- 2009: Summary judgment denied
- 2010: Trial

# How to Lose \$152 Million

## EVIDENCE

- Experts: performance and comp systems were “subjective” and vulnerable to bias
- Stats: women got lower performance scores and made \$75/month less
- Affidavits:
  - “First comes love, then comes marriage, then comes flex time and a baby carriage”
  - “Oops – too late”
  - Other allegedly inappropriate comments

# How to Lose \$152 Million

## BEST JUDICIAL QUOTE OF THE DECADE

The court must be “wary of a claim that the true color of a forest is better revealed by reptiles hidden in the leaves than by the foliage of countless free-standing trees.”

Nevertheless, the “plaintiffs have produced enough foliage to raise questions about the forest’s color.”

# How to Lose \$152 Million

## TRIAL TESTIMONY

- Plaintiffs
  - Unfair pay practices
  - Promotion and salary increase denials after pregnancy leave
  - “Baby carriage” poem recital
  - Inappropriate contact by doctor at social event
- Defendants
  - Above were isolated “anecdotal” incidents
  - Testimony from female employees with positive experiences

# How to Lose \$152 Million

## VERDICT

- \$3.4 million in compensatory damages
- \$250 million in punitive damages
- 5,600 class members sought individual compensatory damages (\$1+ billion?)
- Equitable relief
- Settled for \$152 million

# How to Lose \$152 Million

## LESSONS

- Don't rest on your laurels
- Get PROACTIVE – train managers, fire bad ones and address adverse impact NOW
- Get REACTIVE – investigate and address ALL claims
- Beware “pattern and practice” claims
- Beware newsworthy allegations
- Consider early settlement

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## Which of the following were actual rulings by the Supremes in the past year?

- A. An employer can monitor employee “sexting” if it has a “legitimate work-related purpose”
- B. “Reverse discrimination” is bad: test results can only be thrown out if there is a “strong basis” of evidence
- C. Title VII’s anti-retaliation protection includes employees who answer questions during an internal investigation
- D. Age must be “THE” versus only “a” factor to win ADEA suit
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## How to Get Sued by the EEOC

- Don't address harassment/discrimination aggressively
- Don't adequately investigate complaints against execs
- Don't follow your own policies
- Don't accommodate
- Retaliate
- Act in bad faith

What's

**NEW?**

**What three words starting  
with the letter “e” best  
describe the government’s  
current approach to  
employment law?**



## Enforcement, Enforcement, Enforcement

- Chao (“compliance assistance”) versus Solis (“new sheriff in town”)
- 200 new Wage & Hour Compliance Officers
- \$25 million and 100 DOL enforcers to target independent contractor misclassifications
- 50 new lawyers to enforce Title VII, ADA and IRCA
- ICE targeting 1,000 employers
- More and more OFCCP and OSHA audits

**True or False? I don't have to worry about the new Dodd-Frank Act because it only applies to financial institutions.**

- A. True
- B. False



**True or False? I don't have to worry about the new Dodd-Frank Act because it only applies to financial institutions.**

**A. True**

**B. False**



## The Dodd-Frank Act includes which of the following?

- A. New whistleblower protections
- B. New retaliation provisions
- C. New “say on pay” and “pay for performance” requirements
- D. New Comp Committee independence rules
- E. New proxy disclosures
- F. Longer SOX filing periods and increased penalties
- G. Provides “bounties” of up to 30% of penalties
- H. All of the above and much much more

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## In addition to all the health care changes, what else does PPACA require?

- A. All U.S. citizens to move to Canada
- B. Extension of the COBRA subsidy to 12-31-10
- C. Breaks for nursing mothers
- D. All of the above
- E. None of the above

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## Is “looksism” illegal?

- A. Yes
- B. No
- C. Maybe

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B. No

**C. Maybe**

## Looksism: Recent Cases

- Too hot for banking?
- Too ugly for Abercrombie & Fitch?
- S, XS or XXS??

## Looksism: Recent Stats

- Looks: #3 most important success factor
- 68% say looks affects performance perception
- 2/3 would hesitate to hire an overweight candidate
- 84% would hesitate to hire candidate who looks “significantly older” than co-workers
- 46% favor anti-looksism law

**KEY: JOB-RELATED, JOB-RELATED, JOB-RELATED**

*Source: Business Week*

**POLL:** Should discrimination based solely on appearance be illegal?

- A. Yes
- B. No

## Which of the following is NOT real?

- A. New machine called Pepper Mouth that emits a foul odor when employees use foul language
- B. New TV show called *The Naked Office* in which employees are encouraged to get naked to help resolve workplace disputes
- C. Online service that provides fake references for a small fee
- D. Green cards will actually be green again
- E. All of the above are very real



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## What Else Is New?

- HIRE Act: payroll tax “holiday”
- Mental Health Parity Act
- New EEOC opinions on credit checks and education
- New from the DOL:
  - Searchable enforcement tool
  - H-1B and union elections advisors
  - Wage, safety and EEO compliance coming soon?

What's

**NEXT?**

**POLL:** Women now make up the majority of the non-farm workforce and the vast majority of college attendees. The U.S. will soon be more than 50% nonwhite. The Supreme Court and even the Oval Office reflect more diversity than ever before. So, when will Title VII be repealed?

- A. By the end of the week
- B. By the end of the decade
- C. By 2030
- D. By 2050
- E. Never

## After the Mancession: Women @ Work

- 50.3% of non-farm workforce
- 57% of college students
- 40% of #1 breadwinners
- 77¢ for every \$1 (up from 58¢ in 1972)
- Only 3% of CEOs and 13% of executive officers
- \$431,000 less over career
- Barriers to female success gone?
  - Men: 60% “yes”
  - Women: 50% “yes”

*Sources: Bureau of Labor Statistics, Catalyst, TIME Magazine, Center for American Progress*

**What Presidential  
appointment is freaking out  
lots of employment lawyers  
because of what it could  
mean for the future?**

# BECKER TO NLRB

## Who Needs Congress?

- “The NLRB has the ability to unduly increase union power and leverage without intervention by Congress.”  
(U.S. Chamber of Commerce)
- Bush-era decisions at risk
  - E-mail organizing rules
  - “Salts”
  - “Supervisor” definition
  - Extraordinary remedies
- EFCA?

## You can fire only one employee from TV's The Office. Whom should you fire first to reduce risk?

- A. Jim, office prankster who's married to a co-worker
- B. Toby, hapless HR "professional" who never enforces a single policy
- C. Dwight, bobble-headed salesperson who brings weapons and dead animals to work
- D. Michael, manager who disdains everything about HR
- E. Andy, violence-prone moron who's dating/stalking a co-worker

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Technology

BYTES

**1 out of every \_\_\_ employees has forwarded a sex-related e-mail at work.**

- A. 50
- B. 10
- C. 7
- D. 3
- E. 2
- F. 1

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*Source: Harris Interactive*

## Can my company monitor employee email and Internet usage and take employment action based on that monitoring?

- A. Yes
- B. Yes, if the employee signed a consent form consistent with either the model contract and/or safe harbor provisions of NRPA (National Right to Privacy Act)
- C. It depends on whether the company has a policy deflating any expectation of privacy and whether it's consistently enforced
- D. No

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## Tech @ Work



- Social networking more than doubled in the past year
- 90% of employees surf the 'Net
- 50% ignore social media bans
- 47% spend more than 30 minutes on-line
- 45% use social media to screen candidates
- 40% block access to social networking sites
- 25% change security settings to enhance socializing
- 21% would turn down a job if unsocial

*Sources: Consumer Reports, Vault.com, Manpower Employment Blawg, Wall Street Journal, Challenger, Gray & Christmas, Harris Interactive, Fulbright & Jaworski, Society of Corporate Compliance & Ethics, Cisco, Clearswift*

## **POLL:** Do you currently use a social networking tool?

- A. Yes
- B. No
- C. What's social networking?

## **POLL:** If yes, what tool do you use most?

- A. Facebook
- B. LinkedIn
- C. MySpace
- D. Twitter
- E. Other

## Tech @ Court



- Think hard before you hit “delete”
- Think hard before you hit “send”
- Beware the Stored Communications Act (SCA):  
Don’t steal employee social networking passwords
- Don’t intercept communications while being made
- Disclose if blogger is hawking your products or services

## Get Social

- 90% of policies out-of-date
- Talk to a teenager
- Train employees
  - “Mom Test”: permanent record
  - Harassment is harassment
- “Intelligence”: job-related
- **Sample social media policy on BLAWG**



*Sources: Challenger, Gray & Christmas, Harris Interactive, Fulbright & Jaworski*

Wage &

HOUR

## How do you determine if an independent contractor is really an independent contractor?

- A. It depends on a confusing, ambiguous multi-factor test dependent on behavioral and financial control and the parties' overall relationship that differs in worker's compensation, tax and other contexts
- B. It is the employer's option to choose either status, depending on which is more advantageous from a tax perspective
- C. It is the employee's option to choose
- D. Under the newly passed Contractor Clarification Law, a person can be an independent contractor only if he or she (1) is separately incorporated, (2) provides services to other companies and (3) works in a recognized "profession" as defined under the law

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# Independent Contractor

- **KEY: CONTROL** – behavioral and financial
- DOL's control factors:
  - Permanency of relationship
  - Contractor's investment in equipment, etc.
  - Contractor's opportunity for profit or loss
  - Contractor's independent judgment and initiative
  - Whether services are integral to employer's business

## Pay or not pay?

- A. On-call time
- B. Commute time
- C. Wait time
- D. Changing into and out of uniform if required at work
- E. Donning and doffing safety gear
- F. Walking between changing and production areas
- G. Rest periods of 30 minutes or less
- H. Bona fide meal periods of 30 minutes or more
- I. Travel during the course of the work day
- J. Travel outside work hours

## Exempt or Non-exempt?

- Follow the tests, not assumptions
- Job titles, descriptions and salary aren't conclusive
- If make sweeping changes, be very careful – back pay claims, increased OT costs, morale
- Beware state law

## What Does the FLSA Require?

- Minimum wage
- Overtime unless exempt
- 1.5 times regular rate for 40+ hours
- Restriction of minors' jobs/hours

## What Is the “Regular Rate”?

The total amount earned in a particular workweek divided by the number of hours worked

## What Records Must Be Kept?

- Wages paid and hours worked by non-exempt employees
- Keep for 3 years

## What Are the Potential Penalties?

- Class action
- Back pay
- Overtime pay
- Monetary fines
- Punitive damages
- Injunctive relief
- Criminal penalties
- Attorneys' fees

## When Is an Employee Exempt?

Employees must be paid the minimum specified by statute and (except for the computer exemption) be salaried

- Executive
  - Primarily engaged in management
  - Direct 2 or more FTEs
  - Authorized to affect terms and conditions of other employees through hiring, firing, etc.
- Administrative
  - Office or non-manual work related to general business operations
  - Independent judgment and discretion in significant matters
- Professional
  - Functions that require advanced knowledge in a field of science or learning
- Computer
  - Functions that require application of systems analysis techniques, design or development of computer systems or programs, or the creation or modification of programs relating to operating systems
- Outside Sales
  - Make sales and regularly work away from the employer's business

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Medical

ISSUES

## Which of the following increase your chances of getting sued under GINA?

- A. Including questions about family medical history on your application
- B. Terminating an employee after a positive test
- C. Commingling medical and other information
- D. Asking too many ?s about medical issues
- E. Discriminating against employees named Gina
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## GINA (Genetic Information Nondiscrimination Act)

Generally prohibits:

- **Employers** from (1) collecting genetic info and (2) discriminating based on genetic info
- **Health insurers/plans** from (1) requiring genetic testing and (2) discriminating based on genetic info
- **Retaliation**

**An employee comes into your office at 4:58 on a Friday afternoon and informs you that he suffers from multiple medical conditions, including “work-induced narcolepsy,” “spontaneous combustion syndrome” and “episodic cubicle-confinement hyper-grumpiness.” He demands several accommodations, including: (1) a portable I.V. hooked up to an espresso machine, (2) a fire extinguisher mounted to his head; (3) three-and-a-half weeks off each month and (4) your office. If you have time to make only one call, to whom should it be?**

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**JOB ACCOMMODATION NETWORK (JAN)**

**800-526-7234**

**[jan.wvu.edu](http://jan.wvu.edu)**

Don't Wait,

**INVESTIGATE**

**Bob is normally a responsible, quiet employee. One day, however, he shows up two hours late and acts “obscenely happy, wearing make-up, avoiding eye contact, continuously rubbing his legs and touching everyone.” He also does a “crazy monkey arm dance” and begins “twirling and talking gibberish, flying around in the office in a hyper state.” Then he leaves. What do you do?**

- A. Fire him for inappropriate workplace behavior
- B. Do a crazy monkey arm dance in his honor until he returns
- C. Drug test him
- D. Give him a chance to explain his behavior

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**Following a batch of frivolous complaints against execs that resulted in several of them hating your guts because you conducted the investigations, you institute a policy calling for brief “reviews” rather than full-scale investigations whenever a complaint comes in against an exec. What’s most likely to happen next?**

- A. Nothing: recent research shows that 94% of all complaints are frivolous
- B. You get a big raise and a promotion for sparing execs the hassle and embarrassment of getting investigated
- C. You get fired after the company pays a big settlement based in part on your failure to conduct an appropriate investigation

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## STEP 1: PREPARE

**P**lan the investigation strategy

**R**eview relevant policies and handbook provisions

**E**valuate pros and cons of investigation

**P**ick a competent and impartial investigator

**A**nalyze potential risk factors

**R**eview allegations and prep list of witnesses and ?s

**E**stablish a confidential investigation file

## STEP 2: INVESTIGATE

**I**nterview the complaining employee first

**N**ow – don't procrastinate

**V**iew the site of the alleged incident

**E**ach relevant witness identified by the complaining party should be interviewed

**S**upervisors should be involved to provide context

**T**ake the time to gather all potentially relevant evidence

## STEP 2: INVESTIGATE

**I**nterview the accused

**G**ather any potentially mitigating evidence and talk to witnesses identified by the accused

**A**nalyze all the evidence objectively

**T**alk to an attorney about any potential legal issues

**E**nd the investigation with a written report and appropriate communication

How to

**FIRE**

without getting fired

## Who files more lawsuits: rejected applicants or terminated employees?

- A. Rejected applicants
- B. Terminated employees

## Who files more lawsuits: rejected applicants or terminated employees?

A. Rejected applicants (3% of lawsuits)

**B. Terminated employees (80% of lawsuits)**

# TERMINATION TEST: 6 QUESTIONS

1. Notice: Did the company give reasonable notice of the consequences of the conduct?
2. Rule: Is the rule reasonably related to (a) orderly, efficient and safe operations and (b) performance the company should reasonably expect?
3. Investigation: Did the company conduct a full, fair and timely investigation into the facts?
4. Proof: Is there sufficient evidence that the employee is guilty as charged?
5. Consistency: Has the company applied the rule consistently to all employees?
6. Penalty: Does the punishment fit the crime, considering (a) the seriousness of the offense and (b) the employee's service record?

Lightning

ROUND

## What lessons can employers learn from the David Letterman, Bob Barker, Bill O'Reilly, Conan O'Brien and Jay Leno legal sagas?

- A. Don't sleep with your employees
- B. If you do, come clean
- C. Even if allegations are against a superstar employee, investigate
- D. Carefully craft a communication plan
- E. Employment agreements can come back to haunt you
- F. All of the above

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**Many employment disputes can be traced back to a lack of leadership. According to research, what is the single most important leadership trait?**

- A. Charisma
- B. Humility
- C. Kindness
- D. Proactivity
- E. Results-driven
- F. Height
- G. Coordinating accessories
- H. Smooth dance moves

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# FREE TOOLS

- **BLAWG**
  - Cheat Sheets
  - Checklists
  - Employment Law News
  - Employment Law Library
  - *Weekly Office Analysis*
  - Question of the Week
- **ALERT**
- **TWITTER** @manpowerblawg



Smartest Person  
in the Audience

QUIZ

THANK  
YOU!